

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Biltmore Broadcasting, L.L.C.)	CSR-5826-A
)	
For Modification of the Santa Barbara-)	
Santa Maria-San Luis Obispo,)	
California DMA)	

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 2002

Released: May 2, 2002

By the Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Biltmore Broadcasting, L.L.C., licensee of station KADY-TV (Ch. 63), Oxnard, California ("KADY-TV"), filed the above-captioned petition for special relief seeking to modify the Santa Barbara-Santa Maria-San Luis Obispo, California designated market area ("DMA") to include twenty-eight communities located within the Los Angeles, California DMA.¹ Oppositions to this petition were filed on behalf of AT&T Broadband and Falcon Cablevision, a California Limited Partnership d/b/a Charter Communications (collectively "AT&T/Charter"), Time Warner Cable ("Time Warner"), and Century-TCI California, L.P. d/b/a Adelphia Cable Communications ("Adelphia"). KADY-TV filed a consolidated reply. After examining the record, we deny KADY-TV's request with respect to twenty-four of the communities, and grant it with respect to four.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and the rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Broadcast Signal Carriage Issues ("*Must Carry Order*"), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.² A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media

¹The communities requested for inclusion are: Agoura Hills, Burbank, Calabasas, Canoga Park, Canyon Country, Chatsworth, El Segundo, Encino, Gardena, Glendale, Granada Hills, Hawthorne, Hidden Hills, La Canada/Flintridge, La Crescenta, Lawndale, Los Angeles, Malibu, Montrose, Northridge, San Fernando, Santa Clarita, South Pasadena, Torrance, Van Nuys, Westlake Village, Winnetka, and Woodland Hills, California.

²8 FCC Rcd 2965, 2976-2977 (1993).

Research.³ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁴

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

... with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁵

In considering such requests, the 1992 Cable Act provides that:

... the Commission shall afford particular attention to the value of localism by taking into account such factors as –

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the

³Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. *See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

⁴For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁵47 U.S.C. §534(h)(1)(C).

⁶*Id.*

[DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁷

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁸

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(A) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(B) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating to the service areas.

Note: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁹

(C) Available data on shopping and labor patterns in the local market.

(D) Television station programming information derived from station

⁷H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁸*Must Carry Order*, 8 FCC Red at 2977 n. 139.

⁹The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

logs or the local edition of the television guide.

(E) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(F) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹⁰

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

5. The issue before us is whether to grant KADY-TV's request to include the twenty-eight requested communities within its television market. KADY-TV is assigned to the Santa Barbara-Santa Maria-San Luis Obispo DMA, while Los Angeles County, where the communities are located, is within the Los Angeles DMA.

6. In support of its request, KADY-TV argues that its request should be granted because it meets the market modification criteria. KADY-TV asserts that it meets the historic carriage factor because it is carried on cable systems within the Los Angeles DMA that serve eight of the requested communities.¹¹ Although it is not carried on every cable system serving the cable communities, KADY-TV argues that the Commission has made it clear that it will not give great weight to a station's lack of historic carriage on a particular system because the must carry provisions were adopted, in part, to cure past discriminatory signal carriage practices.¹² KADY-TV states that its predicted Grade A contour encompasses all of the communities at issue.¹³ KADY-TV notes that the Commission has stated that a station's Grade A or Grade B contour coverage is an indicator of local service.¹⁴ In addition, KADY-TV maintains that it provides programming which is not only of interest to California coast residents in general, but of particular interest to the residents of the requested communities.¹⁵ KADY-TV states that it

¹⁰47 C.F.R. §76.59(b).

¹¹Petition at Exhibit 5.

¹²See e.g., *Time Warner Cable*, 10 FCC Rcd 8045, 8048 (1995); *Time Warner Cable*, 10 FCC Rcd 6663 6667 (1995).

¹³Petition at Exhibit 3.

¹⁴See e.g., *Media General Cable of Fairfax County, Inc.*, 15 FCC Rcd 149, 155 (2000); *Busse Broadcasting Corporation*, 11 FCC Rcd 6408, 6420 (1996); *Must Carry Order*, 8 FCC Rcd at 2977; *DP Media License of Battle Creek, Inc.*, 13 FCC Rcd 7122, 7127 (1998); *Channel 56 of Orlando, Inc.*, 12 FCC Rcd 4071, 4081 (1996).

¹⁵Petition at Exhibit 6.

airs locally-produced public affairs programming as well as local news and weather.¹⁶

7. KADY-TV argues that it is geographically proximate to the communities at distances ranging from 17.2 to 51.3 miles from its transmitter site.¹⁷ KADY-TV states that these distances are well within the range found acceptable in previous Commission decisions which either granted the addition of communities or denied requests for exclusion.¹⁸ KADY-TV asserts that Nielsen audience ratings indicate that it is viewed in television households in an area that includes a number of the cable communities for which it requests market modification.¹⁹ Moreover, KADY-TV states that it is used as a vehicle by at least 71 advertisers serving the greater Los Angeles area and is listed in the major television viewing guides distributed in the cable communities, including the Los Angeles edition of *TV Guide*, the *Los Angeles Times*, and the *Los Angeles Daily News*.²⁰ KADY-TV argues that Ventura County, where its city of license is located, is geographically and economically linked to the Los Angeles area.²¹

8. Finally, KADY-TV argues that grant of its request is justified by the Bureau's previous action in *Costa de Oro Television, Inc.*, which granted the inclusion of Los Angeles market communities within the market of KJLA, another Ventura County station.²² KADY-TV points out that KJLA broadcasts from the same tower as KADY-TV and the signal contours of both stations are virtually identical.²³ KADY-TV argues that the Commission has long recognized the importance of treating similarly-situated parties alike and that if it wishes to treat them differently, it must adequately explain its reasons for doing so.²⁴ In this instance, KADY-TV maintains that there are no differences between KADY-TV and KJLA that justify differing treatment.

9. Adelphia argues in opposition that KADY-TV fails to demonstrate that the requested communities should be included in its market and its petition should be denied, at least as far as Adelphia's communities are concerned.²⁵ Adelphia argues that the *Costa de Oro* case which KADY-TV cites in support of its request is distinguishable from KADY-TV's situation because in that decision, the Bureau stated that "there is another station transmitting from the same antenna site which has not joined in this request and which appears to accept Santa Barbara as its market."²⁶ In any event, Adelphia notes

¹⁶ *Id.* at Exhibit 7.

¹⁷ *Id.* at Exhibit 8.

¹⁸ See e.g., *KNTV License, Inc.*, 16 FCC Rcd 6785 (2001) (35-55 miles); *Paxson Atlanta License, Inc.*, 13 FCC Rcd 20087 (1998) (50 miles); *Burnham Broadcasting, Inc.*, 10 FCC Rcd 7117 (1997) (48 miles); *Time Warner Cable*, 10 FCC Rcd 8045 (1996) (60 miles); *Cablevision Systems Corporation*, 11 FCC Rcd 6453 (1996) (48-55 miles); *Time Warner Cable*, 11 FCC Rcd 3510 (1996) (45 miles).

¹⁹ Petition at Exhibit 9.

²⁰ *Id.* at Exhibits 10 and 11.

²¹ *Id.* at 11.

²² 13 FCC Rcd 4360 (1998); *recon. denied*, 15 FCC Rcd 12637 (2000).

²³ Petition at Exhibits 3 and 4.

²⁴ *Id.* at 4, citing *Petroleum Communications, Inc. v. FCC*, 22 F. 3d 1164, 1172 (D.C. Cir. 1994) ("We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently.").

²⁵ Adelphia states that it serves the communities of Agoura Hills, Calabasas and Westlake Village from its Thousand Oaks cable system; Woodland Hills, Van Nuys and Encino from its Woodland Hills cable system; and another portion of Van Nuys, as well as San Fernando, from its Sherman Oaks cable system.

²⁶ 13 FCC Rcd at 4374.

that despite purported Grade B coverage, factors such as intervening mountain ranges played a part in the Bureau's decision in *Costa de Oro*, which only partially granted KJLA's request for inclusion.²⁷ Indeed, Adelphia points out that on reconsideration, the Bureau denied some of the communities it had originally granted for inclusion.²⁸ Adelphia states that the *Costa de Oro Reconsideration* also specifically rejected KJLA's claim that predicted Grade B coverage was enough to warrant the requested communities' inclusion because the terrain involved made "predicted contours . . . particularly unreliable."²⁹ Adelphia argues that more relevant precedent can be found in decisions which recognized the fact that, because Arbitron Ratings Company divided Ventura County into eastern and western portions for station coverage due to terrain, the western portion, where KADY-TV's city of license, Oxnard, is located, is more properly part of the Santa Barbara market and not the Los Angeles DMA.³⁰

10. Adelphia maintains that Section 614(h)(1)(C) of the Act directs the Commission to take four specific factors into account in analyzing modification requests and that the Commission has no authority to ignore these factors in their evaluation.³¹ As a result, Adelphia argues that if a petitioner cannot satisfy any one of these statutory factors, or fails to make a showing on any one, the Commission must deny the petition.³² In this instance, Adelphia states that KADY-TV has not even attempted to demonstrate under the third statutory factor that Adelphia does not already carry local television stations which air programming specifically targeted to the communities it serves. Moreover, Adelphia points out that, with regard to Adelphia's communities, KADY-TV failed to provide evidence that it satisfied the historic carriage factor, provided meaningful viewership or provided programming of specific interest to Adelphia's communities.³³ Adelphia notes that in a previous decision, the Bureau denied a television station's modification request based on its failure to provide a showing on the statutory factors.³⁴ Adelphia indicates that, not only has KADY-TV never been carried on its Woodland Hills and Sherman Oaks cable systems, but it is not carried on any other nearby cable systems.³⁵ For the communities served by its Thousand Oaks cable system, where KADY-TV indicates carriage, Adelphia notes that the information provided by KADY-TV in Exhibit 5 of its petition appears only to cover late 2001.³⁶ Adelphia maintains that this is not sufficient to demonstrate that KADY-TV has been historically carried in those communities, particularly as the Commission has repeatedly ruled that a brief period of carriage pursuant

²⁷ *Id.*

²⁸ *Costa de Oro Reconsideration*, 15 FCC Rcd at 12645-46.

²⁹ *Id.* at 12642.

³⁰ See e.g., *Smith Broadcasters of Santa Barbara Limited Partnership*, 10 FCC Rcd 9447 (1995); *Avenue TV Cable Service, Inc.*, 11 FCC Rcd 4803 (1996), *aff'd*, 11 FCC Rcd 10419 (1996); *Costa de Oro Television*, 10 FCC Rcd 9468 (1995), *aff'd*, 12 FCC Rcd 22464 (1997), *aff'd by judgment sub nom*, 335 U.S. App. 318 (D.C. Cir. 1998).

³¹ Adelphia Opposition at 7; see also 47 U.S.C. §534(h)(1)(C).

³² Adelphia Opposition at 8.

³³ *Id.* at 9.

³⁴ *Id.*, citing *Idaho Independent Television, Inc.*, 11 FCC Rcd 21060 (1996).

³⁵ *Id.* at Exhibits A thru C.

³⁶ Petition at Exhibit 5. The specific Adelphia communities referred to are Agoura Hills, Calabasas and Westlake Village.

to the must carry provisions does not satisfy the historic carriage factor.³⁷

11. Adelphia states that KADY-TV also has no reportable viewership in Los Angeles County, where the subject communities are located and thus has no viewing patterns which would be disrupted by a denial of KADY-TV's petition.³⁸ Adelphia asserts that there is no evidence that KADY-TV is the type of "weaker" station described by the Bureau in previous decisions.³⁹ Adelphia argues that KADY-TV's lack of historic carriage in or near Adelphia's communities merely indicates that the residents do not consider KADY-TV a local station.⁴⁰ Moreover, Adelphia states that KADY-TV apparently operates at a transmitting power of 5000 kilowatts, which is considered normal to strong for a full-power commercial station and not characteristic of a "weaker" station in technical terms.⁴¹ Adelphia points out that it does not carry any other Santa Barbara market station, including KJLA, which is unable to deliver a good quality signal to its cable systems.⁴² Adelphia argues that KADY-TV has failed to sufficiently demonstrate that it provides coverage or local service to Adelphia's communities, especially programming, and attempts to satisfy this factor on Grade A or Grade B coverage alone.⁴³ However, Adelphia points out that KADY-TV fails to mention the several mountain ranges which separate KADY-TV from the subject communities and which sharply curtail its actual coverage and make it unable to deliver a good quality signal to the Woodland Hills and Sherman Oaks systems.⁴⁴ In any event, Adelphia maintains that the Cable Act does not elevate Grade A or Grade B coverage over the other market modification factors.⁴⁵ Finally, Adelphia states that the communities it serves are located considerably closer to their home Los Angeles DMA core stations than they are to KADY-TV.⁴⁶

12. AT&T/Charter state in opposition that they serve 12 of the 28 communities KADY-TV requests for inclusion.⁴⁷ They maintain that KADY-TV's petition should be denied because the station has failed to demonstrate that it adequately meets the market modification criteria with regard to the communities. AT&T/Charter argue that KADY-TV's attempt to piggyback its request on the *Costa de Oro* decision is misplaced. AT&T/Charter state that, unlike KADY-TV, KJLA had Grade A coverage over the communities for which it was granted inclusion and, in addition, KJLA was actually reassigned

³⁷See e.g., *Comcast Cablevision of Santa Maria, Inc.*, 13 FCC Rcd 24192, 24197 (1998); *Northstar Television of Providence, Inc.*, 11 FCC Rcd 1736, 1738 (1996).

³⁸Adelphia Opposition at 11.

³⁹*Id.* at 12, citing Petition at 6-7; see also *Time Warner Cable*, 10 FCC Rcd at 8048 (affording undue weight to historic carriage would, "in effect, prevent weaker stations which cable systems had previously declined to carry, from ever being carried.").

⁴⁰Adelphia Opposition at 13.

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.* at 14.

⁴⁴*Id.* at 15.

⁴⁵*Id.*, citing *Must Carry Order*, 8 FCC Rcd at 2977.

⁴⁶*Id.* at 17.

⁴⁷AT&T states it serves the communities of Canyon Country and Santa Clarita. Charter states it serves the communities of Agoura Hills, Burbank, Calabasas, Glendale, Hidden Hills, La Canada/Flintridge, La Crescenta, Malibu, Montrose and South Pasadena.

to the Los Angeles DMA from the Santa Barbara market as of January 1, 2000.⁴⁸ AT&T/Charter point out that KADY-TV is not carried in any of AT&T's system communities.⁴⁹ While KADY-TV is carried by Charter in the communities of Agoura Hills, Calabasas, Malibu and Hidden Hills, AT&T/Charter argue that such carriage does not serve as evidence of KADY-TV reach into the Los Angeles market because the principal headends serving these communities also serve communities located within KADY-TV's home county of Ventura.⁵⁰ AT&T/Charter point out that Charter is required to carry KADY-TV in all of the communities served by this system because Charter is unable to separate KADY-TV's signal for delivery only to communities located within Ventura County.⁵¹ AT&T/Charter state that KADY-TV also fails to explain the circumstances surrounding its carriage in the remainder of communities it claims. As a result, petitioners argue that it is unclear whether these systems are carrying KADY-TV pursuant to a retransmission consent agreement or pursuant to the must carry regulations. In any event, AT&T/Charter note that these communities all appear to be located closer to Ventura County than to the communities which KADY-TV is seeking to include.⁵²

13. AT&T/Charter argue that although KADY-TV claims that each of the communities falls within its Grade A contour, a Longley-Rice study demonstrates that none of the subject communities lies within KADY-TV's Grade A contour and only one community, Agoura Hills, lies within the station's Grade B contour.⁵³ AT&T/Charter state that the Commission has held that "[t]he Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis."⁵⁴ AT&T/Charter state that this is especially important in this situation where KADY-TV is separated from the communities in question by the Santa Monica Mountains, the Santa Susana Mountains and the Simi Hills.⁵⁵ AT&T/Charter argue further that KADY-TV's city of license is geographically distant from its cable communities, at an average of 45.8 miles.⁵⁶ AT&T/Charter note that these distances are comparable to those in prior Commission decisions which granted requests for exclusion.⁵⁷

14. AT&T/Charter assert that KADY-TV also does not provide any programming specifically tailored to its communities.⁵⁸ AT&T/Charter state that KADY-TV's programming appears to consist entirely of syndicated and paid programming which has no nexus or relevance to the residents of

⁴⁸ AT&T/Charter Opposition at 2.

⁴⁹ *Id.* at Exhibit 2.

⁵⁰ *Id.* at 3.

⁵¹ *Id.* See also 47 C.F.R. §76.55(e)(3) and (4).

⁵² *Id.*

⁵³ *Id.* at Exhibit 4.

⁵⁴ *Id.* at 3-4, citing *Modification Final Report and Order*, 14 FCC Rcd at 8388.

⁵⁵ *Id.* at 4.

⁵⁶ *Id.* at Exhibit 1.

⁵⁷ *Id.* at 5, citing *Greater Worcester Cablevision, Inc.*, 13 FCC Rcd 22220 (1998) (39-79 miles); *Greater Worcester Cablevision, Inc.*, 12 FCC Rcd 17347 (1997) (38-61 miles); *Time Warner Cable*, 12 FCC Rcd 23249 (1997) (42-58 miles); *Time Warner Cable*, 11 FCC Rcd 13149 (1996) (45 miles); *Cablevision of Cleveland and V Cable, d/b/a Cablevision of Ohio*, 11 FCC Rcd 18034 (1996) (41 miles).

⁵⁸ *Id.* at 6.

the communities.⁵⁹ Moreover, AT&T/Charter state that KADY-TV does not dispute that the cable systems already carry other stations that provide ample local programming to its subscribers.⁶⁰ AT&T/Charter argue that the Nielsen report which KADY-TV submits as evidence of its viewership gives no indication of what percentage of the data listed is attributable to the subject communities. AT&T/Charter point out that a separate viewership study they conducted was unable to find any ratings for KADY-TV in Los Angeles County.⁶¹ In addition, AT&T/Charter maintain that KADY-TV's lack of nexus is demonstrated by the fact that neither the Los Angeles edition of *TV Guide* nor the programming guide found in the *Los Angeles Times* includes KADY-TV.⁶² Finally, AT&T/Charter argue that the fact that some businesses in Los Angeles County choose to advertise on KADY-TV does not demonstrate that KADY-TV has any viewers in or targets the communities at issue.

15. In its opposition, Time Warner states that it serves 18 of the 28 communities requested for inclusion.⁶³ Time Warner argues that KADY-TV's petition should be denied because of the station's failure to meet the statutory criteria for market modification. Also, Time Warner points out that Ventura County, where KADY-TV is located, is physically separated from Los Angeles County and the subject communities by mountains, as well as pockets of the City of Los Angeles with its large population, traffic congestion, tall buildings, and urban electrical noise, all of which minimize any meaningful relationship or nexus between the communities and KADY-TV.⁶⁴

16. Time Warner states that, despite being on-the-air since 1985, KADY-TV has never been carried on any of Time Warner's systems.⁶⁵ Although KADY-TV states that it meets the historic carriage criterion because it claims carriage in several Los Angeles County communities, Time Warner points out that, of the 28 communities requested, KADY-TV is being carried in only eight, which is only 28.6 percent of the total communities.⁶⁶ Time Warner argues that while cable operators in Los Angeles County are not required to carry KADY-TV pursuant to the must carry requirements, they are not barred from doing so pursuant to retransmission consent. Time Warner maintains that the fact that the majority have not done so reflects KADY-TV's failure to provide coverage and/or programming which has an appeal to Los Angeles viewers.⁶⁷ Time Warner also argues that KADY-TV's reliance on its predicted Grade A coverage to demonstrate its technical service is misplaced because the station fails to provide a consistent Grade B signal level throughout the communities.⁶⁸ Time Warner states that the results of a Longley-Rice

⁵⁹*Id.*

⁶⁰*Id.* at 7 and Exhibits 2 and 6.

⁶¹*Id.* at Exhibit 7.

⁶²*Id.* at 7.

⁶³Time Warner states that the 18 communities are served by three separate entities with which it is associated: 1) West Valley Cablevision Industries, Inc. serves the communities of San Fernando, Canoga Park, Chatsworth, Encino, Granada Hills, Northridge, Winnetka, Van Nuys, Woodland Hills, Santa Clarita and Canyon Country (West Valley System); 2) Time Warner Entertainment-Advance/Newhouse Partnership serves the community of South Pasadena (South Pasadena System); and 3) Paragon Communications serves the communities of Gardena, Hawthorne, Lawndale, El Segundo and Torrance (South Bay System).

⁶⁴Time Warner Opposition at 2.

⁶⁵*Id.* at 3.

⁶⁶*Id.*

⁶⁷*Id.* at 4.

⁶⁸*Id.*

propagation study of KADY-TV's signal which it commissioned indicate the following: a) for the South Pasadena System there are only 4 isolated instances of a signal level for KADY-TV greater than Grade B within the city limits of South Pasadena; b) for the South Bay System there is 1 instance of a Grade B signal level in Gardena and Hawthorne and 3 in Torrance, but none in El Segundo or Lawndale; and c) for the West Valley System there are isolated pockets of Grade B signal levels – 1 in Winnetka and Van Nuys, 2 in Northridge and Woodland Hills, 4 in Encino – but none in the remaining communities.⁶⁹ Time Warner argues that KADY-TV's attempt to piggy-back on the Bureau's decision in *Costa de Oro* is also misplaced because in that case the Bureau relied exclusively on KJLA's predicted Grade A coverage because no Longley-Rice study was proffered.⁷⁰ Time Warner maintains that because the Longley-Rice study it provided establishes a true picture of KDAY-TV's service, the station's reliance on *Costa de Oro* provides no supporting precedent.

17. Time Warner argues further that a careful review of the programming examples provided by KADY-TV reveals little programming which could be considered as specific to Time Warner's communities and are plainly insufficient to overcome KADY-TV's signal coverage short-fall.⁷¹ In addition, Time Warner notes that the distances between its communities and KADY-TV have been found in previous Bureau decisions to be sufficient to justify exclusion of a station from a market for must carry purposes.⁷² As regards viewership, Time Warner asserts that the special Nielsen study KADY-TV submits has no quantification as to the station's actual viewership.⁷³ In any event, Time Warner notes that this report appears to show only minimal viewing of KADY-TV in Los Angeles County. Moreover, Time Warner states that the use of KADY-TV by 71 advertisers in the greater Los Angeles area is insufficient, by itself, for a finding that the Time Warner communities are within the scope of KADY-TV's market.⁷⁴

18. In its consolidated reply, KADY-TV argues that while the cable operators collectively argue that its reliance on *Costa de Oro* is misplaced and should not be followed their reasoning is inapposite. Although KADY-TV concedes that some of the relief KJLA requested in *Costa de Oro* was denied, requests for carriage on other cable systems within the Los Angeles market were granted. KADY-TV maintains, therefore, that it is entitled to the same treatment under *Melody Music, Inc. v. FCC*.⁷⁵ KADY-TV argues that the cable operators have failed to demonstrate why the precedent of *Costa de Oro* is not applicable or why the facts and circumstances relied on there are any different when applied to KADY-TV's situation.⁷⁶ KADY-TV states that, for all practical reasons, it and KJLA are near mirror images – they are commonly located on the same tower, have the same effective radiated power and are

⁶⁹*Id.* at Attachments 2A through 2C. Time Warner notes for the West Valley System that there are 2 locations in Northridge with a Grade A signal level, while Grade A and Grade B levels were found only at higher elevations in Santa Clarita, areas which are sparsely populated.

⁷⁰*Id.* at 7-8.

⁷¹*Id.* at 9.

⁷²West Valley System – distances range from 3 miles to 45 miles; South Pasadena System – 61 miles; and South Bay System – 56 miles. *See also* footnote 58 above for cited cases.

⁷³Time Warner Opposition at 11.

⁷⁴*Id.* at 12.

⁷⁵Reply at 3, citing 345 F. 2d 730 (D.C. Cir. 1965).

⁷⁶*Id.* at 3.

separated by only six frequency channels.⁷⁷ Moreover, KADY-TV asserts that the fact that it seeks to piggy-back itself upon the *Costa de Oro* decision is consistent with existing precedent.⁷⁸ KADY-TV also argues that its market modification request is really *res judicata*. It notes that in the *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, the Commission stated that notwithstanding its conversion of market definitions from ADI to DMA, “it would leave intact final market modification decisions made pursuant to Section 614(h) in order to avoid disturbing settled expectations. . . .”⁷⁹ Since it is from a facilities standpoint the “technical doppelganger” of KJLA, KADY-TV submits that it is clearly entitled to have its market modified.

19. KADY-TV maintains that, while the cable operators contest its coverage of the communities and argue that the Longley-Rice prediction methodology should be the accepted measure of a television station’s service, precedent dictates that a station may demonstrate local service simply by showing that it delivers “at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage.”⁸⁰ KADY-TV points out that the same coverage and terrain interference arguments raised herein were similarly raised in *Costa de Oro*, yet the Commission ultimately granted KJLA the same market modification which KADY-TV now seeks.⁸¹ Moreover, KADY-TV points out that the Commission has often held that a predicted Grade A or Grade B contour is “persuasive evidence” of local service.⁸² With regard to geographic distance, KADY-TV argues that the distances cited from its transmitter site to the various target communities range from 17.2 miles up to 51.3 miles. It asserts that these distances are fundamentally within the range the Commission has historically found suitable either for adding communities to a station’s market or rejecting the deletion of communities.⁸³ KADY-TV asserts that it is indisputable that, with the Commission’s conversion of markets from ADI to DMA, Ventura County is now located in the Los Angeles DMA and this realignment dictates carriage of KADY-TV in the requested communities.⁸⁴

20. KADY-TV argues further that its failure to have historic carriage in all of the requested communities should not be deemed a basis for denial. Because one of the primary reasons for its petition is to increase the number of systems on which its signal will be carried, KADY-TV maintains that historic signal carriage should not necessarily be decisionally significant in the Commission’s assessment of market modification criteria.⁸⁵ Indeed, KADY-TV points out that the Commission has recognized that “if

⁷⁷*Id.* at 3-4.

⁷⁸*Id.* at 4, citing *Paxson San Jose License, Inc.*, 12 FCC Rcd 17520, 17526 (1997) (When confronted with a case involving substantially a mirror-image of another previously-decided case, as here, there is a “strong” basis for granting a market modification.).

⁷⁹16 FCC Rcd 5022, 5027 (2001), citing *Modification Final Report and Order*, 14 FCC Rcd at 8384.

⁸⁰*Must Carry Order*, 8 FCC Rcd at 2977.

⁸¹Reply at 7.

⁸²See e.g., *Channel 56 of Orlando, Inc.*, 12 FCC Rcd 4071 (1996); *Paragon Cable*, 10 FCC Rcd 9462 (1995); *Coomcast Cablevision of Santa Maria, Inc., et al.*, 13 FCC Rcd 24192 (1998); *Channel 39, Inc.*, 13 FCC Rcd 3108 (1998); *Amendment of Section 76.51 (Orlando-Daytona Beach, Melbourne, and Cocoa Beach, Florida)*, 102 FCC 2d 1062, 1070 (1985).

⁸³See e.g., *Paxson Phoenix License, Inc.*, 13 FCC Rcd 8555 (1998) (47.8 miles); *Erie Cablevision, Inc.*, 13 FCC Rcd 6403 (1998) (63.34 miles); *Paxson Atlanta License, Inc.*, 13 FCC Rcd 20087 (1998) (50 miles).

⁸⁴Reply at 10.

⁸⁵*Id.*

[historic carriage] were found to be controlling that would, in effect, prevent newer or weaker stations from ever being entitled to carriage.”⁸⁶ In addition, KADY-TV states that the cable operators incorrectly believe that general interest programming cannot be of any local interest to viewers. KADY-TV points out that it recently broadcast, or has scheduled to broadcast, the California gubernatorial debates and regularly schedules local newscasts.⁸⁷ KADY-TV argues that such programming plainly serves both local interests and the paramount public interest. Also, KADY-TV states that since September 2001, it has ceased being a UPN affiliate and evolved into an independent station which has increased its local programming and initiated specialty programs focusing on literacy, education, health and nutrition, as well as other issues targeted to both Los Angeles and Ventura counties.⁸⁸ In any event, KADY-TV notes that neither the Commission’s rules nor the Cable Act provide a minimum amount of local programming that a station must air to qualify for market modification.⁸⁹ Finally, KADY-TV objects to the cable operators’ contentions that it failed to show whether or not other television stations serve the target communities and that it failed to show a nexus between KADY-TV and advertisers in the Los Angeles market. KADY-TV states that Exhibit 5 to its petition contains listings of the news and public affairs programming available to the communities. Moreover, KADY-TV contends that in light of its inclusion in the Los Angeles DMA, any argument that it has not established a nexus to the advertisers is groundless.

21. KADY-TV is seeking to add 28 communities located in the Los Angeles DMA to its Santa Barbara DMA.⁹⁰ KADY-TV places the most emphasis on the Bureau’s decision in *Costa de Oro*, which partially granted KJLA’s request for modification to include several communities located within the Los Angeles DMA. KADY-TV maintains that because KJLA is licensed to a community in Ventura County, as is KADY-TV, and because it transmits from the same tower as KADY-TV, KADY-TV is thus entitled to similar treatment in its request for modification. There are several factors which distinguish the two situations. At the time of the *Costa de Oro* decision, the Commission relied on the Arbitron’s “areas of dominant influence” (“ADIs”) to determine the markets of television stations and KJLA was assigned to the Santa Barbara ADI. However, the Commission was on the eve of switching to the use of Nielsen’s DMAs to determine markets and had stated that, in light of this proposed transition, “information regarding DMAs could be useful in deciding individual cases” where a change in market might occur due to the transition.⁹¹ Because Nielsen had assigned KJLA to the Los Angeles DMA, this factor was of paramount importance in determining whether to grant any or all of KJLA’s requested modification, despite the fact that KJLA met few of the necessary market modification criteria. Ultimately, the Bureau granted KJLA’s request with respect to those communities located within its predicted Grade A contour.

⁸⁶ *Paxson San Jose License*, 12 FCC Rcd at 17525.

⁸⁷ Reply at 11.

⁸⁸ *Id.*

⁸⁹ *Id.* at 12.

⁹⁰ Adelphia argued in its opposition that KADY-TV’s petition was not community-specific because the station failed to list the CUID numbers associated with the communities listed in its petition. While CUID numbers may be helpful to a degree, there is no requirement that petitioners seeking market modification must include them in their request. The only requirement is that petitioners clearly identify the individual communities which are the subject of their request. This KADY-TV did and we find, therefore, that KADY-TV’s request met the community-specific requirement.

⁹¹ See *Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules*, 11 FCC Rcd 620, 6223 (1996) (“*Market Definition Order*”).

22. In the instant case, KADY-TV is still considered by Nielsen to be part of the Santa Barbara DMA, despite the fact that Ventura County, where KADY-TV's city of license is located, is considered to be part of the Los Angeles DMA. In addition, KADY-TV only meets the historic carriage market modification factor for the communities of Agoura Hills, Calabasas, Hidden Hills and Malibu; there is no history of carriage on the remaining 24 communities. The evidence relating to this statutory factor weighs in favor of excluding these 24 communities from the market of KADY-TV, but is not outcome determinative by itself. It is noteworthy, however, that none of the cable operators herein carries any other Santa Barbara market stations. In addition, KADY-TV has not shown that the programming it provides has any specific nexus to the residents of the subject communities nor has it shown that it achieves any viewership in the communities.

23. Although KADY-TV has shown that the subject communities are located within its predicted Grade A contour, a Longley-Rice study submitted by AT&T/Charter and Time Warner indicates that none of the communities actually receives a Grade A signal. KADY-TV has no measurable audience share in Los Angeles County, despite being on the air since 1985 and being a full power commercial station. We also note that, unlike KJLA, KADY-TV is not a "specialty" station such that it would be expected that viewership would be minimal.⁹² We also do not find either the advertising evidence presented by KADY-TV or its listing in *TV Guide* to be persuasive enough to overcome the other deficiencies. The advertisers KADY-TV points to appear to be general in nature, with no specific connection to the communities requested for inclusion, and the edition of *TV Guide* to which KADY-TV refers appears to focus on the Ventura County portion of the Los Angeles market. From the fact that Nielsen continues to assign KADY-TV to the Santa Barbara market and the geographical boundaries which exist between Ventura County and Los Angeles, it appears that KADY-TV's main focus is directed more towards Santa Barbara than towards Los Angeles.

24. In light of the above, we find that a grant of KADY-TV's request with respect to the communities of Burbank, Canoga Park, Canyon Country, Chatsworth, El Segundo, Encino, Gardena, Glendale, Granada Hills, Hawthorne, La Canada/Flintridge, La Crescenta, Lawndale, Los Angeles, Montrose, Northridge, San Fernando, Santa Clarita, South Pasadena, Torrance, Van Nuys, Westlake Village, Winnetka and Woodland Hills, California, is not in the public interest. We find, after review, that KADY-TV fails to meet any of the market modification criteria that would justify their inclusion in KADY-TV's market.

25. For the communities of Agoura Hills, Calabasas, Hidden Hills and Malibu, however, we will grant KADY-TV's request. These communities are part of a technically-integrated cable system operated by Charter, a portion of which, including the headend, is located in Ventura County. AT&T/Charter have argued that KADY-TV was carried in these four communities only because Charter was unable to filter out KADY-TV's signal from the Ventura County portion of its system, where carriage of KADY-TV was required. We find, however, that because KADY-TV has been carried on this system since at least 1993, it has established long-term carriage in these communities regardless of the reason for carriage. As a result, a possible disruption in service to the residents of these communities would not be in the public interest, particularly as the system serving these communities carries KADY-TV in other communities located in Ventura County, where KADY-TV has must carry status.

⁹²Foreign-language and religious stations, which are considered "specialty" stations, in general have lower viewership than commercial television stations.

IV. ORDERING CLAUSES

26. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534) and Section 76.59 of the Commission's rules (47 C.F.R. §76.59), that the captioned petition for special relief (CSR-5826-A), filed by Biltmore Broadcasting, L.L.C. **IS GRANTED** for the communities of Agoura Hills, Calabasas, Hidden Hills, and Malibu, California, and **IS OTHERWISE DENIED**.

27. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.⁹³

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Murphy
Chief, Policy Division
Media Bureau

⁹³ 47 C.F.R. §0.321.